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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re R.B., a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

R.H.,

Defendant and Appellant.

D048444

(Super. Ct. No. J511740I)

APPEAL from a judgment of the Superior Court of San Diego County, Cynthia Bashant, Judge. Affirmed.

R.H. appeals a judgment of the juvenile court terminating his parental rights to his minor son R.B. (minor) under Welfare and Institutions Code section 366.26.¹ R.H.

¹ Statutory references are to the Welfare and Institutions Code.

contends the court erred by: (1) denying his section 388 petition for modification seeking to have the minor returned to his custody, or alternatively, for further reunification services; and (2) finding the beneficial parent-child relationship exception of section 366.26, subdivision (c)(1)(A) did not apply to preclude terminating his parental rights. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The minor was born in October 2004 to Tami B. and R.H. In January 2005, the San Diego County Health and Human Services Agency (Agency) filed a petition under section 300, subdivision (b), alleging Tami had a substance abuse problem and had lost custody of several other children, and R.H. failed to protect or supervise the minor. According to the detention report, Tami had nine children, none of whom were in her care and several of whom had been adopted. Tami was recently terminated from a drug treatment program after testing positive for cocaine. R.H. refused to discuss with the social worker any details concerning the minor. He said Tami was a good mother who had been depressed since her mother died in 2002. R.H. did not know what Tami's problem was. He advised Tami not to talk to the social worker or sign anything. The court detained the minor in out-of-home care and ordered supervised visits for the parents.

Tami was pregnant and R.H. claimed to be the father of that child. He told the social worker he and Tami had been in a committed relationship from 2001 through 2004. He had no idea where Tami was currently living and claimed to have no knowledge of Tami's drug problem. R.H. told the social worker he would continue his

relationship with Tami only if she completed drug rehabilitation. R.H. had adult children who lived in another state. When the children's mother died, his oldest daughter raised his youngest daughter.

Agency believed there was a risk to the minor if he were placed with R.H. based on R.H.'s professed ignorance of Tami's drug problem despite having had a relationship with her for three years. He attempted to have himself declared the father of two of Tami's other children, who became dependents after they were born with positive toxicology for cocaine. Although R.H. consistently denied knowing Tami's whereabouts, he later admitted having taken her and the minor to a medical appointment during the time Agency could not find them. In the social worker's opinion, R.H. was not a responsible parent in that he helped Tami hide from Agency and the parole department.

The social worker recommended offering reunification services to R.H. and arranged for four hours of visitation per week with the minor. R.H. said the minor needed to be with his mother until he was 12 years old, claiming Tami did the best she could to be a good mother. The social worker recommended R.H. take a parenting class and participate in counseling to show he understood the need to protect the minor from Tami's unhealthy lifestyle.

At a contested jurisdiction and disposition hearing, the social worker reiterated her concerns that R.H. would not protect the minor. The court stated it had "enormous concerns" about R.H.'s ability to protect the minor, noting R.H. had chosen to support Tami rather than protect the minor. Nevertheless, the court gave the social worker discretion, with the concurrence of minor's counsel, to expand visits to include overnight.

In a six-month review report, Agency recommended terminating services and setting a section 366.26 selection and implementation hearing. R.H. began therapy but stopped attending a month later. He said therapy was not beneficial because all he did was sit and listen. R.H. recently scheduled a new therapy appointment. He believed he needed to attend only six or seven sessions.

R.H. cancelled one visit with the minor in May 2005, and two in June. Consequently, the visitation center would no longer supervise his visits. R.H. blamed the social worker for this. He cancelled another visit at the beginning of July and told the social worker he could not visit at all in July because he had more important things to do. R.H. attended three visits with the minor in August. He claimed he had done everything he was asked to do, and said he wanted overnight visits.

According to an addendum report, Tami recently gave birth to her 10th child, J.B. R.H. said he could not verify if he was J.B.'s father. He completed a parenting class and attended six therapy sessions. He blamed missed sessions on the therapist's vacation schedule. The therapist reported R.H.'s attendance was now consistent, he had a positive attitude toward therapy and was very cooperative. The therapist recommended R.H. continue with therapy before reunifying with the minor.

At a contested six-month review hearing, the court found R.H. had not shown true commitment to the minor. He cancelled numerous visits and did not visit for an entire month because he had better things to do. The court commented there was nothing more important than bonding with one's child and R.H. failed to take advantage of visits offered to him for this purpose. The court found R.H. had made no progress in therapy

and was simply going through the motions to get custody of the minor so he could return him to Tami. The court terminated services and set a selection and implementation hearing under section 366.26.

According to an assessment report, R.H. was currently receiving services in J.B.'s case. Tami admitted having used cocaine while pregnant with J.B. The minor had been placed in a prospective adoptive home with one of his siblings. The social worker recommended adoption as the minor's permanent plan.

The social worker reported the minor was healthy and developmentally on target. He appeared to be bonded to his caregiver and his sibling. R.H. had sporadic contact with the minor, missing an entire month of visits, and cancelling numerous visits because he had car trouble or poor health. When he did visit, R.H. was affectionate with the minor, who seemed comfortable with him. On a few occasions, R.H. fell asleep while holding the minor and was told he needed to stay awake. When the visitation location was changed due to the minor's new placement, R.H. became upset and said he could not travel that far because he had to set a budget to deal with his court cases. R.H. agreed it was too difficult for the minor to travel 100 miles one-way to see him. However, R.H. said it was a hardship for him to have visits at the social worker's office because of the distance he would need to travel. He refused to commit to a schedule, claiming he needed to set the visits according to his schedule. R.H. complained about the need for supervision and discussed having someone at the visit to observe the social worker supervising the visit. He said, "I have to buy my children back from the system in fuel."

The social worker noted the minor recognized R.H. and enjoyed visits with him. However, the minor did not behave in a way that indicated he had a significant bond with R.H. He did not cry at the end of visits or show any fear or anxiety when separating from R.H. The minor was more active and social with his caregiver and his sibling than he was with R.H.

R.H. did not appear to understand the severity of the issues that brought the minor into protective custody. Despite knowing about Tami's substance abuse problem, R.H. believed all children need to be with their mothers. In the social worker's opinion, the relationship the minor had with R.H. was not so significant as to outweigh the benefits the minor would gain through a permanent plan of adoption. The prospective adoptive parent was willing to allow R.H. and Tami to send letters and photographs, and possibly have visits in the future.

R.H. filed a section 388 petition for modification, requesting the court vacate the selection and implementation hearing and place the minor in his care, with or without services. As changed circumstances, R.H. alleged he had continued and progressed in therapy as part of his services for J.B., and he no longer had a relationship with Tami. As to the minor's best interests, R.H. alleged he had arranged services on his own despite limited resources, and he believed the minor deserved the opportunity to be raised, along with J.B., by him.

In an addendum report, the social worker described additional visits she had observed between R.H. and the minor as generally appropriate, although R.H. had difficulty meeting the needs of both the minor and J.B., and R.H. did not seem to

understand the developmental stages of these children. In the social worker's opinion, continuing therapy and visitation did not constitute changed circumstances. She noted R.H. refused to visit the minor unless the visitation site was convenient for R.H. The minor recognized his father and had a good time with him, but showed little emotion when greeting and leaving him.

At a hearing on the section 388 petition and to select and implement a permanent plan for the minor, R.H. called social worker Brian Howley, who was assigned to the reunification phase of the minor's case as well as to J.B.'s case. Howley testified he recommended services for R.H. in J.B.'s case once R.H. established paternity. He was aware R.H. was attending therapy and visiting J.B. regularly. R.H. had completed a parenting class and was in the process of obtaining a psychological evaluation for J.B.'s case. The therapist never recommended placing J.B. with R.H. In Hawley's opinion, R.H. was beginning to deal with the seriousness of Tami's drug problem.

R.H.'s therapist, Hugh Kamen, Ph.D., testified R.H. had been regularly attending therapy for 10 months, except for one three-month period. One of the goals of therapy was to help R.H. understand Tami's limitations so that R.H. could protect his children. In Dr. Kamen's opinion, R.H. now understood this. Although Dr. Kamen did not believe there was a protective issue, he stated R.H. needed more instruction and experience regarding parenting young children. Dr. Kamen did not believe R.H. would give the minor or J.B. to Tami.

R.H. testified he had been attending therapy regularly, even though it was a financial hardship for him. He acknowledged Tami's psychological problems presented a

risk to the minor. He claimed he would not give the minor to Tami. R.H. said Agency made it difficult for him to visit the minor, claiming he did everything he could and blaming Agency for canceling visits on short notice. He denied refusing to drive to Oceanside for visits, but complained about the expense. R.H. admitted canceling visits with the minor, but stated he always notified everyone days in advance.

R.H. further testified he and the minor were bonded such that the minor recognized him. During visits, R.H. fed the minor, changed his diapers, read to him and played with him. R.H. had a stroller and all necessary baby items. He attended only one of the minor's medical appointments. R.H. was presently unemployed, so he would not need childcare for the minor. He stated he did not telephone the minor's foster home to inquire about the minor's well-being because he did not have the telephone number, and he did not request the telephone number "out of respect for the foster parents." R.H. then testified Agency refused to give him any information about the foster home.

R.H. did not know where his adult children were living and he had not seen any of them since their mother died almost 10 years ago.

Social worker Valerie Pofahl testified that at the time she received the case, R.H. had completed a parenting class and attended some therapy. She did not consider R.H.'s continued therapy to be a changed circumstance because there had been no real changes in his situation since services were terminated, and he had not progressed beyond supervised visits. Pofahl stated Dr. Kamen's belief that R.H. needed intensive parenting instruction supported her position.

Pofahl based her assessment of risk to the minor if placed with R.H. on the respective ages of the minor and R.H., her observations during visits and her conversations with the minor's caregiver. Pofahl believed R.H.'s intentions were good, but he could not adequately and appropriately parent the minor without risk. The minor's needs were being met in his foster home where he was bonded with his sibling, and Pofahl believed it would be detrimental to remove the minor from his current caregiver.

The visits Pofahl observed between R.H. and the minor were positive, but she characterized the relationship as one of a relative, not a primary caregiver. The minor did not react negatively at the end of visits, but he did get upset when his caregiver left the room.

When R.H. refused to visit the minor in Oceanside, Pofahl arranged for visits at her office, which required the minor to travel an extra 30 miles. Based on her observations at visits, Pofahl believed R.H. lacked knowledge about what is age-appropriate for young children. R.H. was overwhelmed when he tried to care for both the minor and J.B. during visits.

After considering the evidence and hearing argument of counsel, the court found that although R.H. was beginning to realize Tami was a risk to her children, this was at best a "changing circumstance." Despite Dr. Kamen's assessment there was no protective issue, the court could not find it would be in the minor's best interests to place him with R.H. immediately. Further, it was not in the minor's best interests to continue services in the hope R.H. would at some point be able to reunify with the minor. Accordingly, the court denied R.H.'s section 388 petition.

The court then proceeded to the selection and implementation hearing. The various reports were received into evidence and the parties presented no further evidence. After hearing argument of counsel, the court found the minor was almost 18 months old and had never lived with R.H. R.H. had never progressed beyond weekly supervised visits and did not develop the type of bond required by section 366.26, subdivision (c)(1)(A). Finding adoption was in the minor's best interests, the court terminated parental rights and referred the minor for adoptive placement.

DISCUSSION

I

R.H. contends the court abused its discretion by denying his section 388 petition for modification to have the minor returned to his care, or alternatively, for further services. He asserts he showed circumstances had changed and the minor's best interests required granting the modification petition.

A

Under section 388, a party may petition the court to change, modify or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that there is a change in circumstances or new evidence, and the proposed change is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415-416.) Whether a previous order should be modified and a change would be in the child's best interests are questions within the sound discretion of the juvenile court. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) The juvenile court's order will not be disturbed on appeal unless the

court has exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. When two or more inferences reasonably can be deduced from the facts, we have no authority to substitute our decision for that of the trial court. (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319; *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.)

When the court evaluates the appropriate placement for a child after reunification services have been terminated, its sole task is to determine the child's best interests. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 320.) In this context, the goal is to assure the child "stability and continuity." (*Id.* at p. 317.)

B

As changed circumstances, R.H. alleged he continued to participate in therapy, he maintained visitation with the minor, he was participating in services for J.B., and he no longer had a relationship with Tami. However, R.H. only recently began to realize that Tami posed a risk to the minor and was unavailable to parent him. The court attributed this realization, in part, to Tami having disappeared. Although R.H. had completed a parenting class and was participating in therapy, Dr. Kamen believed R.H. needed more intensive parenting training and further therapy. In this regard, R.H.'s circumstances were "changing," but had not "changed." A petition that alleges merely changing circumstances does not promote stability for the child or the child's best interests because it would mean delaying the selection of a permanent home to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point.

(*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.) "'Childhood does not wait for the parent to become adequate.'" (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.)

Even had R.H. shown sufficient changed circumstances, he did not show modifying the court's previous order was in the minor's best interests. At the time of the hearing on the section 388 petition, the focus of the proceedings had shifted from family preservation to providing the minor with a safe, stable, permanent home. (See *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) The social worker believed the minor would be at risk in R.H.'s care. R.H. had not progressed beyond supervised visits, and he needed more therapy and parenting training before the minor could safely be returned to him. The minor's needs were being met in his foster home where he was bonded with his sibling. In the social worker's opinion, it would be detrimental to remove the minor from his current caretaker. The court properly evaluated the evidence presented at the section 388 hearing in light of the minor's need for stability and continuity (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317), and found the minor's best interests would not be served by returning him to R.H.'s custody or by ordering further reunification services. The court acted well within its discretion by denying R.H.'s section 388 petition. (*Id.* at pp. 318-319.)

II

R.H. challenges the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship exception of section 366.26, subdivision (c)(1)(A) did not apply to preclude terminating his parental rights. He asserts he maintained regular

visitation and contact with the minor who shared a strong father-son relationship with him.

A

We review the judgment for substantial evidence. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those findings. We do not consider the credibility of witnesses, attempt to resolve conflicts in the evidence or evaluate the weight of the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order and affirm the order even if there is substantial evidence supporting a contrary conclusion. (*In re Baby Boy L.*, *supra*, 24 Cal.App.4th at p. 610; *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.) The parent has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947; *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 573.) If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds termination of parental rights would be detrimental to the child under one of five specified exceptions. (§ 366.26, subd. (c)(1)(A)-(E); *In re Erik P.* (2002) 104 Cal.App.4th 395, 401; *In re Derek W.* (1999) 73 Cal.App.4th 823, 826.)

Section 366.26, subdivision (c)(1)(A) is an exception to the adoption preference if termination of parental rights would be detrimental to the child because "[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." We have interpreted the phrase "benefit from continuing the relationship" to refer to a "parent-child" relationship that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; accord *In re Zachary G.* (1999) 77 Cal.App.4th 799, 811.) "In other words, if an adoptable child will not suffer great detriment by terminating parental rights, the court must select adoption as the permanent plan." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.)

To meet the burden of proof for this statutory exception, the parent must show more than frequent and loving contact, an emotional bond with the child or pleasant visits. (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) "Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The relationship arises from day-to-day interaction, companionship and shared experiences." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Although day-to-day contact is not

required, it is typical in a parent-child relationship. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51.) The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment from child to parent. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

B

Here, the evidence showed R.H. did not regularly visit the minor. R.H. canceled numerous visits and did not visit for an entire month because he had better things to do. In any event, R.H. did not meet his burden of showing there was a beneficial parent-child relationship sufficient to apply the exception of section 366.26, subdivision (c)(1)(A). The minor had never lived with R.H. He enjoyed visits with R.H. but separated easily from him after visits. The minor was more active and social with his caregiver and his sibling than he was with R.H. In the social worker's expert opinion, there was no significant bond between R.H. and the minor. The relationship R.H. had with the minor was that of a relative, rather than a primary caregiver. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1420-1421 [social worker is an expert in the assessment and selection of permanency planning for a dependent minor].) Instead, the minor looked to his caregiver to meet his needs. There was no evidence of a "significant, positive, emotional attachment" from the minor to R.H. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

Further, R.H. did not show his relationship with the minor was sufficiently beneficial to outweigh the benefits of adoption. Until recently, R.H. showed a lack of insight by his denial of Tami's drug problem and his statement that the minor should be

raised by Tami. He did not completely understand age-appropriate behavior, and he was overwhelmed when trying to interact with his two children during visits. R.H. attended only one of the minor's medical appointments and did not telephone the foster home to inquire about the minor's well-being.

Moreover, there was no evidence that severing the parent-child relationship would greatly harm the minor. Where, as here, the biological parent does not fulfill a parental role, "the child should be given every opportunity to bond with an individual who will assume the role of a parent." (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 854.) The minor, whose needs could not be met by R.H., deserves to have his custody status promptly resolved and his placement made permanent and secure. Substantial evidence supports the court's finding the exception of section 366.26, subdivision (c)(1)(A) did not apply to preclude terminating R.H.'s parental rights.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.